

Winter 1972

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Joseph Remcho

Lawyers Military Defense Committee

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Recommended Citation

Remcho, Joseph (1972) "Military Juries: Constitutional Analysis and the Need for Reform," *Indiana Law Journal*: Vol. 47 : Iss. 2 , Article 1.

Available at: <http://www.repository.law.indiana.edu/ilj/vol47/iss2/1>

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INDIANA LAW JOURNAL

VOLUME 47

WINTER 1972

NUMBER 2

MILITARY JURIES: CONSTITUTIONAL ANALYSIS AND THE NEED FOR REFORM*

JOSEPH REMCHO†

In a long line of cases the Supreme Court has consistently protected and expanded the right of the criminal defendant to trial by an impartial jury of his peers.¹ The Court has been particularly attentive to the right of minority group members to be tried by juries from which members of their group have not been excluded.²

In 1968 the Supreme Court held in *Duncan v. Louisiana*³ that the right to trial by jury is so fundamental that it extends, as a constitutional matter, to persons tried in state as well as in federal courts. In the same year Congress passed the Jury Selection and Service Act of 1968,⁴ declaring as a matter of national policy not only that all litigants in federal courts who are entitled to a jury shall have the right to "juries selected at random from a fair cross section of the community,"⁵ but also that "all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States."⁶ Most recently the Court has characterized trial by jury as the citizen's bulwark against "oppression by the Government."⁷ This characterization is

* The author wishes to express his gratitude to Prof. Charles R. Nesson of the Harvard Law School and to Prof. Edward F. Sherman of the Indiana University School of Law, Bloomington, for their aid in the preparation of this article.

† Staff Attorney, Lawyers Military Defense Committee, Washington, D. C.

1. *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Norris v. Alabama*, 294 U.S. 587 (1935); *Strauder v. West Virginia*, 100 U.S. 303 (1880). But see *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

2. The right does not inhere solely in the defendant:

People excluded from injuries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.

Carter v. Jury Comm'r, 396 U.S. 320, 329 (1970).

3. 391 U.S. 145 (1968).

4. 28 U.S.C. § 1861 *et seq.* (1970).

5. 28 U.S.C. § 1861 (1970).

6. 28 U.S.C. § 1861 (1970).

7. *Williams v. Florida*, 399 U.S. 78, 100 (1970). In this case, however, the Court held that twelve-member juries are not constitutionally required in state courts.

verified by the fact that juries have at times refused to convict defendants charged with crimes stemming from unpopular political beliefs which the Government has found offensive.⁸

Millions of Americans, however, do not enjoy the rights or responsibilities of jury service. Members of the armed forces have only a token representative jury system because Congress and the courts have accepted the arguments that military courts are exempt from the constitutional requirements of trial by jury and that representation on military courts of lower ranking enlisted men would seriously undermine military discipline. As a result military courts are almost invariably composed of officers, usually those senior in rank.⁹

In the light of recent reaffirmation of the fundamental importance of trial by jury¹⁰ and the recent expansion of the constitutional rights of servicemen in other areas,¹¹ it is important to examine once again the method by which military courts are selected and the assumption which have led the nation to deny so many American citizens trial by an impartial jury of their peers.

CURRENT PRACTICE IN THE SELECTION OF MILITARY COURT— MARTIAL MEMBERS

Selection of triers of fact in both general and special courts-martial is governed by article 25 of the Uniform Code of Military Justice.¹² Article 25 specifies those who are eligible to serve on a court-

8. J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE OF JOHN PETER ZENGER (S. Katz ed. 1963); Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969); cf. H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY* 286-97 (1966).

9. See text accompanying notes 15-16 *infra*.

10. See text accompanying note 80 *infra*.

11. Cases cited note 93 *infra*.

12. The procedures for convening courts-martial are outlined in DEP'T OF DEFENSE, *MANUAL FOR COURTS-MARTIAL* (rev. ed. 1969) [hereinafter cited as *MANUAL*], which implements the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.* (1970) [hereinafter referred to as UCMJ]. These procedures highlight the central role that the convening authority has in court-martial proceedings. A general or special court-martial is created by a commanding officer or other competent superior authority. The convening authority in a general court-martial appoints an officer to investigate and to recommend the proper action to be taken and the charges to be brought, but his recommendations are not binding. Then, with the aid of his staff judge advocate, the convening authority prefers charges, appoints counsel for the government and for the accused and selects the members of the court. He is free to replace court members at any time prior to arraignment of the accused. UCMJ, arts. 22-32; 10 U.S.C. §§ 822-32 (1970).

The convening authority has complete discretion to convene either a special or a general court-martial for the same offense. Since a special court-martial may not adjudge a sentence greater than six months [UCMJ, art. 19; 10 U.S.C. § 819 (1970)], the convening authority is, thus, able to set the maximum sentence. He may also reduce or suspend sentences or overrule findings of guilty. UCMJ, art. 64; 10 U.S.C. § 864 (1970). The power of the convening authority to reduce sentences does not necessarily

martial and grants to the convening authority a wide range of discretion to select court members from those eligible persons who, "in his opinion, are best qualified . . . by reason of age, education, training, experience, length of service, and judicial temperament."¹³ When, as in most courts-martial, the accused is an enlisted man, he can request that enlisted men serve. In that event, no fewer than one-third of the court must be composed of enlisted men, and none may be lower in rank than the accused.¹⁴ The remaining members will come from the officer ranks. In practice, members of courts-martial are almost invariably officers,¹⁵ and usually at least half are field grade officers, despite the larger number of company grade officers who are available.¹⁶ When enlisted men are requested by the accused, senior non-commissioned officers are usually appointed.¹⁷

Statistics on the rank of enlisted personnel who have served as court members are fragmentary, but a study made by military defense counsel in *United States v. Crawford*,¹⁸ a 1965 Court of Military Appeals case, is most revealing. The study showed that from 1959 through 1963 no enlisted man lower than grade E-4¹⁹ served on an army court-martial.²⁰ During the period from 1959 to 1962, 89.4 per cent of all

work in favor of the accused, since courts may impose longer sentences on the assumption that the commander can reduce them if he wishes. See *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess., at 87 (1949). For a comprehensive and definitive review of the evolution of the UCMJ, see Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970) [hereinafter cited as *Civilianization*]. Particular references to evolving selection procedures are discussed by Professor Sherman at pages 13, 21-23, 43-44, 97-99. See also Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1952); Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 CATH. U.L. REV. 171, 171-79 (1966) [hereinafter cited as Schiesser].

13. UCMJ, art. 25(d)(2), 10 U.S.C. § 825(d)(2) (1970) (emphasis added).

14. UCMJ, art. 25(c)(1), 10 U.S.C. § 825(c)(1) (1970).

15. See text accompanying note 26 *infra*.

16. Field grade officers in the army are those in the ranks of major, lieutenant colonel and colonel. Company grade officers are those in the four warrant officer ranks, second and first lieutenants and captains. In 1970 there were 389,344 commissioned and warrant officers for all branches of the armed forces. Of these, 264,002 were company grade officers. Statistical Tables of the Office of Defense.

17. See text accompanying notes 19-23 *infra*.

18. 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964). Appellate defense counsel were Capt. Charles W. Schiesser and Capt. Daniel H. Benson. See Schiesser, *supra* note 12, at 183-84. Compiling such statistics requires going through all court-martial records. On the difficulty of gaining access to such materials, see Keffe, *JAG Justice in Korea*, 6 CATH. U.L. REV. 1, 43-47 (1956).

19. Army enlisted grades run from E-1 to E-9. Generally, persons in grades E-1 to E-5 would be considered lower ranking enlisted men, although a sergeant E-5 is also considered a noncommissioned officer. Persons in grades E-5 through E-9 are considered noncommissioned officers when placed in leadership positions. Those in grades E-7 through E-9 are considered senior noncommissioned officers, even though an E-7 might be a specialist 7 and not be in a command position.

20. 15 U.S.C.M.A. at 36, 35 C.M.R. at 8.

enlisted court members were in the three highest non-commissioned officer grades (E-7 through E-9), while at the same time fewer than six per cent of the men tried were in these same three grades.²¹ Estimates by the Office of the Judge Advocate General of the Navy show that in recent years fewer than one per cent of the cases tried had enlisted members on the juries and that "the majority of such enlisted members are in pay grade E-7 or above."²² Similarly, the Office of the Judge Advocate General of the Air Force has indicated that, "few if any enlisted men below the grade of E-5 have served" on courts-martial reviewed by that office.²³

Enlisted men generally feel that senior N.C.O.'s are more likely to view the actions of the accused in relation to the objectives of the military in enforcing discipline and insuring compliance with the chain of authority.²⁴ The fears of enlisted men and the expectations that only senior N.C.O.'s will be appointed have resulted in the infrequent exercise of the option of trial by a jury including enlisted men. In 5,582 trials,²⁵ occurring from 1959 to 1963, enlisted men sought appointment of enlisted court members on only 154 occasions or in fewer than three per cent of the total.²⁶ A similar reluctance to request enlisted men is evident today.

21. *Id.* at 51, 35 C.M.R. at 23. Judge Ferguson, dissenting, supplied the figure of 89.4 per cent. Since art. 25(d)(1) provides that no person junior to the accused may judge him, senior men would have been required in six per cent of the cases. That figure was computed from Judge Ferguson's statement that of 154 enlisted men seeking appointment of enlisted men only nine were in the senior three grades. *Id.*, 35 C.M.R. at 23.

22. Letter from Capt. K. A. Konopisos to author, May 10, 1971.

23. Letter from Col. John C. Watson (signed by Lt. Col. Paul W. Buchler) to author, May 21, 1971.

24. See Schiesser, *supra* note 12, at 195-97. Although Lt. Col. Schiesser warns against requesting enlisted men in "military-type" offenses (*e.g.*, unauthorized absence, breach of discipline), he says the senior enlisted member is more "likely to adopt a tolerant attitude toward human shortcomings," such as financial or sexual problems. *Id.* at 196. Many military men disagree with the latter part of that statement. See *Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm.*, 81st Cong., 1st Sess. 724, 1140 (1949).

25. 15 U.S.C.M.A. at 51, 35 C.M.R. at 23. The opinion does not state whether the 5,582 trials included officers as accused, but the number of officers included would be minimal. In 1967, for 1,514 approved convictions, twelve accused were officers. Letter from Stanley H. Rubinowitz, Chief of the Examination and New Trials Division, Army Judiciary, to Michael J. Haroz, Aug. 26, 1968, on file with the author. The figure 5,582 for four years must refer to general courts-martial.

26. Col. John Jay Douglass, Commandant of the United States Army Judge Advocate General's School, reports that "trial by military judge alone has taken place in the overwhelming majority of cases." Douglass, *The Judicialization of Military Courts*, 22 HASTINGS L.J. 213, 222 (1971). Citing statistics from the Army Judiciary, a subdivision of the Department of the Army, he reports that in the six-month period from October 31, 1969, to March 31, 1970, of the 1,248 general courts-martial, 1,078 were tried before a military judge alone. In the same period, 16,540 of the 17,240 accused who had

The Army Judiciary reports that enlisted men were requested in 2.6 per cent of the 2,441 general courts-martial held during 1968.²⁷ In 1969, enlisted men were requested by those accused in little more than two per cent of the 2,625 general courts-martial. In 1970, only eighteen servicemen tried in army general courts-martial elected trial with enlisted men on their courts. They represent less than one per cent of the 2,740 persons tried.²⁸ Statistics from other branches of the armed forces show a similar reluctance of servicemen to request enlisted court members.²⁹

The rare occurrence of courts with lower ranking enlisted men may result in part from the small number of trials in which enlisted men are requested. But if these servicemen are justified in expecting that the selection process will only produce courts with senior commissioned and non-commissioned officers, then the selection process itself is the cause of the general failure to exercise the option. Little attention, however, has heretofore been given to the actual process by which courts-martial members are selected.

the option chose trial before special courts-martial with a judge alone. In 700 cases no military judge was detailed. *Id.*

Figures published in a publication of the Defense Appellate Division, Army Judiciary, are startling. In the month of December, 1970, 88 per cent of army general courts-martial reviewed were tried before a military judge alone. In November of the same year, the figure was 86 per cent; in October, it was 87 per cent. In December, 1970, 100 per cent of special courts-martial adjudging a bad conduct discharge were tried before a military judge. In November, this figure was 99 per cent. *ADVOCATE*, Mar., 1971, at 61. The figures suggest that most accused and their counsel feel a judge will be more likely to acquit or give lighter sentences than a full court. Preliminary data for 1971 would indicate that military judges have a higher conviction rate and adjudge confinement in a greater percentage of the cases than do military juries. *ADVOCATE*, June-July, 1971, at 114-15. This might result in part from the propensity of military defense counsel who think their clients will be found guilty to go before a judge alone, expecting lower sentences. In any case the figures reflect a strong lack of confidence in the military jury, a lack of confidence based on the composition of the juries.

27. Letter from Stanley Rubinowitz, Chief of the Examination and New Trials Division, Army Judiciary, to author, May 6, 1969.

28. Letter from Col. John T. Jones, Director of the Administrative Office, Army Judiciary to author Apr. 19, 1971. "The lesser figure for 1970 was probably due to the high percentage of trials by military judge alone." *Id.* These statistics and others for periods after August, 1968, are not accurate reflections of the percentage of cases in which an accused chose trial by a court, but declined enlisted men, since a growing majority of accused have taken the option of trial by military judge alone which was added to art. 26 by the Military Justice Act of 1968. UCMJ, art. 26(c), 10 U.S.C. § 826(c) (1970).

29. Air Force figures showing the number of requests for airmen in cases reviewed by the Office of the Judge Advocate General indicate that for general courts-martial the percentage of requests was 3.3 per cent in 1967; one per cent in the first half of 1968; 2.3 per cent in 1969; and just under four per cent in 1970. For special courts-martial in which a bad conduct discharge was adjudged, the figures are 1.2 per cent for 1967; 3.3 per cent for the first half of 1968; and fewer than one per cent in 1969 and 1970.

The case of *United States v. Flint*,³⁰ a general court-martial convened by Headquarters, XXIV Corps Danang, provides a typical example³¹ of the normal procedure for selection of court members.³² In *Flint*, the task of providing a list of prospective candidates was delegated to the staff judge advocate. He in turn requested a list from the personnel officer, of XXIV Corps, who requested subordinate units to forward the names of 85 officers for possible duty; 39 of these officers were to be field grade, and 46 were to be company grade.³³ The personnel officers of the various subordinate units then made the selections. Subordinate units often used the duty roster, a rotating list of officers available for special assignment, to make their selections. Other personnel officers selected men they knew or who had free time. The final list of 85 names was given to the staff judge advocate. Neither the staff judge advocate nor the personnel officer of XXIV Corps could testify as to how the figure of 85 was reached or how the breakdown of field and company grade officers was reached. Each testified that when he assumed duty the breakdown was standing policy in his office.³⁴

The deputy staff judge advocate narrowed this list to 25. He deleted names of persons who had previously served on the court, who were in the medical corps and, in this case, those who were in the military

The 1967 and 1968 figures were obtained by inspection of records at the Office of the Judge Advocate General of the Air Force, Court-Martial Records. The 1969 and 1970 figures were obtained from the Office of the Judge Advocate General of the Air Force by letter from Col. John C. Watson (signed by Lt. Col. Paul W. Buchler) to author, May 21, 1971.

The Navy estimates that fewer than one per cent of enlisted men requested enlisted court members in 1969 and 1970. Letter from Capt. K. A. Konopisos to author, May 10, 1971.

30. U.S. Army Court-Martial Convening Order No. 45 (1971).

31. Over the past year the author has been one of four staff attorneys for the Lawyer's Military Defense Committee, Langdell Hall, Cambridge, Massachusetts, with offices in Saigon, South Vietnam. During this time the author has served as defense counsel before Army, Navy and Marine courts-martial in which the method by which court members were selected was challenged. In each case the method of selection has been made a matter of record. The information gained at these pre-trial hearings has been supplemented by discussion with convening authorities, staff judge advocates, trial and defense counsel and line officers. In no case was the strict language of article 25(d)(2) complied with in court selection.

32. The selection process was made a matter of record during pretrial hearings held on May 5, 10 and 11, 1971.

33. The request was for three colonels, thirteen lieutenant colonels, 23 majors, 22 captains, 22 first lieutenants, one second lieutenant and one warrant officer third class. Record, at 72; Appellate Exhibit X.

34. A staff memorandum from one general court-martial jurisdiction suggests that two colonels, three lieutenant colonels, two majors, two captains and one lieutenant would provide a "balanced representation" of ranks. For special courts-martial, the memorandum suggests one colonel, one lieutenant colonel, two majors, one captain and one lieutenant. HQ I Field Force Vietnam, Staff Memorandum 27-1, Feb. 21, 1971.

police corps. Also excluded were persons who had fewer than ninety days to serve in Vietnam. In addition, ten were removed "at random" before the final list was submitted to the general. The reason given for reducing the list to 25 names was that the convening authority could not be expected to make an intelligent choice from so large a list.

The accused's request for enlisted members went to a subordinate command judge advocate who asked his personnel officer for enlisted nominations from grades E-5 through E-8 who met the criteria of article 25(d)(2). This request was referred to a warrant officer,³⁵ a sergeant first class (E-7) and finally to various non-commissioned officers in subordinate units who chose men in the various grades and forwarded their names. The list of 24 officers given to the convening authority, from which he was to select ten individuals, consisted of one colonel, seven lieutenant colonels, nine majors, five captains, three first lieutenants, and no second lieutenants or warrant officers. He was directed to choose four enlisted men from the list of twelve nominees, consisting of three men each from grades E-5 through E-8. The convening authority selected one enlisted man from each grade and then excused the E-5 prior to trial because of his workload.

The *Flint* case is typical. The actual selection process not only resulted in a systematic exclusion of lower ranked enlisted men, but also was made with scant reference to article 25(d)(2) criteria. The deputy staff advocate's request to the personnel office for nominees made no reference to article 25(d)(2) criteria. Although article 25(d)(2) was mentioned in the directive for selecting men, it is unclear whether the criteria were applied or even understood.³⁶ The warrant officer and sergeant first class who were instructed to make the choices knew neither the subordinate enlisted men who chose the enlisted nominees nor the qualifications of the men chosen. Although the convening authority is required to select members who are in his opinion best qualified, the effective choice of court members was exercised by the staff judge advocate, personnel officers, warrant officers and even enlisted men from the N.C.O. ranks. Of the approximately 20,000 men

35. The same warrant officer had testified in a previous case, *United States v. Woodmancy*, U.S. Army Court-Martial Convening Order No. — (1971) [on file at HQ XXIV Corps, Danang, Vietnam], that he personally felt no E-4 or below had enough "sense" to serve as a court member and that he himself had selected only personnel with "career potential."

36. The warrant officer testified that the sergeant read the command judge advocate's request, which contained reference to the article 25(d)(2) requirements of "age, education, training, experience, length of service, and judicial temperament," to each subordinate non-commissioned officer he called. Record, at 96.

under the convening authority's court-martial jurisdiction, all but 36 had been excluded before the convening authority made his selection.³⁷ Senior officers had been favored and the lower ranked enlisted men were almost entirely excluded before the convening authority made his choice. Even during the final selection process the convening authority had no opportunity to apply article 25(d)(2) criteria because no service records or personal information about the nominees were furnished. The lists given to the convening authority contained only name, rank, unit, and date of rotation to next assignment. This is hardly sufficient information on which to form an intelligent opinion as to the relative competence of the nominees.

THE SUPREME COURT AND THE MILITARY JURY

Article 25(d)(2), both on its face and as applied by local commands, is in apparent conflict with several provisions of the United States Constitution. Article III, § 2, provides in part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury." The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The fifth amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." As previously mentioned, this clause of the fifth amendment has been interpreted to require that the jury selection process shall not systematically exclude any identifiable class or group.³⁸ The Supreme Court, however, has consistently assumed, with little discussion, that the right to trial by jury does not apply to courts-martial. In fact the Court has never considered the applicability of the due process clause to military court selection.

The Court subscribed very early to the proposition that military courts are not subject to article III requirements. In *Dynes v. Hoover*,³⁹ decided in 1857, a seaman brought an action claiming that the offense of which he had been convicted was not within the jurisdiction of the

37. In some jurisdictions the convening authority is merely given a list of names which he routinely approves. In *United States v. Wells*, U.S. Air Force Court-Martial Convening Order No. — (1971), *under consideration sub nom.* *United States v. Crawford* (Air Force Ct. of Military Review, No. 20964), the general court-martial convening authority sent a message to the staff judge advocate of the special court-martial convening authority requesting that a panel of ten officers (in specified ranks) be nominated. The staff judge advocate selected twenty names from the officer roster of the special court-martial jurisdiction. He presented the list (along with an officer roster) to the special court-martial convening authority, who "nominated" ten names from the list of twenty. These nominations were subsequently approved by the general court-martial authority upon his staff judge advocate's recommendation.

38. See notes 1 & 2 *supra* & text accompanying.

39. 61 U.S. (20 How.) 65 (1857).

military court. The Court, in dismissing the action, held that because the naval court-martial was properly brought under Navy regulations, no jurisdictional defect was present. Although the jury issue was not raised, *Dynes* held that military courts are basically administrative tribunals independent of article III courts.

The rationale of the Supreme Court was that military courts were treated as a separate entity from the civilian judicial power under the Constitution. To support this reasoning the Court noted that in article I, § 8, Congress was granted the power to "provide and maintain a navy," and "to make rules for the government of the land and naval forces, and that article II, § 2, gave to the President the office of commander-in-chief of the armed forces. Because of this separate treatment, the Court concluded that "the power to provide for the trial and punishment of military and naval offenses . . . is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States."⁴⁰

The Supreme Court also noted that the fifth amendment specifically excepts "cases arising in the land or naval forces" from the grand jury requirement.⁴¹ However, it ignored the sixth amendment mandate that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." which does not exclude cases arising in the land and naval forces. Nor did the Court offer any historical basis for its conclusion that article I, § 8, exempts the armed services from the requirements of article III.

In *Ex parte Milligan*⁴² the Supreme Court confronted the sixth amendment right to jury trial by way of dictum. The majority quoted the sixth amendment and the exception for members of the armed forces in the fifth amendment. But without further discussion, the Court concluded that the sixth amendment right only applied "to those persons who were subject to indictment or presentment in the fifth."⁴³ The concurring opinion by Chief Justice Chase reached the same conclusion using both legislative history and the framers' intent. He noted that prior to the

40. *Id.* at 79.

41. *Id.* at 78. The Court referred to the "8th Amendment" but meant the 5th Amendment provision that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, except on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. . . ." Although an argument might be made that "in time of war" refers to all armed services, the logical construction seems to be that taken by the Court—that the phrase applies only to the militia. See *Johnson v. Sayre*, 158 U.S. 109, 113-15 (1895).

42. 71 U.S. (4 Wall.) 2 (1866).

adoption of the Bill of Rights, three states proposed drafts of the sixth amendment which excluded the armed forces from jury trial guarantees.⁴³ Hence, he concluded that the excepting provision, although embodied only in the fifth amendment, was intended to have general application. Therefore, the sixth amendment, which did not include the proposed exclusion, must be read as if it did.⁴⁴

The first direct challenge to denial of the right to jury trial in the military was heard by the Supreme Court in *Kahn v. Anderson*.⁴⁵ Once again the Court assumed, without analysis, that no such right existed. Although the Court referred to "numerous decisions"⁴⁶ supporting this proposition, it cited only *Ex parte Reed*,⁴⁷ decided in 1879, where the jury issue was not raised.⁴⁸ From this questionable authority, the Court concluded that the constitutionality of acts of Congress touching on the military is no longer open to question.

The jury issue was discussed at some length in *Ex parte Quirin*,⁴⁹ a World War II case involving civilian spy activities in the United States. The defendants, tried by a special military commission,⁵⁰ asserted their right to trial by jury as a ground for habeas corpus. Chief Justice

43. *Id.* at 123.

44. *Id.* at 138. The reasoning of Chief Justice Chase has been expanded in a law review article, Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) [hereinafter cited as Henderson]. Mr. Henderson concluded that the "original understanding" of the framers of the Constitution was that the Bill of Rights did apply to the military, but that both the article III and the sixth amendment jury provisions were specifically excluded. There is, however, nothing in the history he presents to warrant a distinction between the sixth amendment jury guarantee and the rest of the Bill of Rights, nor is there any evidence that article III was not to apply to the military. See also Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958) [hereinafter cited as Wiener].

Article III, § 2 provides, in part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury." There is no exception for the military. Mr. Henderson correctly points out that the failure to except the military cannot be explained on the grounds that the clause was intended to apply only to article III courts, because cases of impeachment, for which the Senate is the exclusive tribunal, are specifically excepted. His conclusion, however, is that the failure specifically to exclude military crimes was the result of "oversight." Similar reasoning and conclusions are used to reconcile a construction excluding the application of the sixth amendment jury provision to the military.

The oversight arguments of Mr. Henderson and of Chief Justice Chase in *Milligan* are questioned in notes 73-80 *infra* and text accompanying.

45. 255 U.S. 1 (1920).

46. *Id.* at 8.

47. 100 U.S. 13 (1879).

48. *Reed* cited only *Dynes* and the Constitution to support denial of the right to jury trial in the military.

49. 317 U.S. 1 (1942).

50. The commission was appointed solely to try the petitioners under procedures prescribed by the President. Order of July 2, 1942, 7 Fed. Reg. 5103 (1942).

Stone stated that the object of article III, § 2, was to preserve the right to jury trial as it then existed and not to expand this right to cases where a jury trial was not guaranteed under the common law. He cited two cases for his conclusion that military courts were not courts in the sense of the judiciary article,⁵¹ but those cases ruled on the applicability of the Judiciary Act of 1789,⁵² not article III. The Chief Justice, citing only *Milligan*, further noted that the fifth and sixth amendments did not enlarge the scope of article III, § 2, since the fifth amendment exception applied by implication to the sixth amendment. He also referred to a "long-continued and consistent interpretation"⁵³ of all three provisions.

In the case of *Whelchel v. McDonald*,⁵⁴ the jury issue was raised in a different form. Whelchel claimed that enlisted members should sit on his court-martial board⁵⁵ and that an all-officer court violated due process requirements. Rather than discuss the applicability of the due process clause to the selection of military courts, the Court summarily dismissed the contention, saying that the make up of the court-martial was "a matter appropriate for congressional action."⁵⁶

Most recently, in *O'Callahan v. Parker*,⁵⁷ the Supreme Court again simply assumed that the right to trial by jury for all crimes does not apply to the military;

The Constitution gives Congress power to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14, and it recognizes that the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply. The Fifth Amendment specifically exempts "cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger" from the requirement of prosecution

51. *In re Vidal*, 179 U.S. 126 (1900); *Ex parte Vallandigham*, 68 U.S. (2 Wall.) 243 (1863).

52. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

53. 317 U.S. at 40.

54. 340 U.S. 122 (1950).

55. At the time of Whelchel's trial the law provided only for officer courts. 10 U.S.C. § 1475 (1946). By 1950, the UCMJ had been passed, permitting enlisted men to serve. 10 U.S.C. § 825(c) (1970).

56. 340 U.S. at 127. For this point Justice Douglas cited *Swain v. United States*, 165 U.S. 553 (1897), in which the President had been allowed to send the case back to the commission twice for a higher sentence, and two cases, *Mullan v. United States*, 140 U.S. 240 (1891), and *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827), upholding the discretion of the commander to choose the number and rank of court members.

57. 395 U.S. 258 (1969).

by indictment and inferentially, from the right to trial by jury.⁵⁸

However, the Court went on to its landmark holding that unless a crime is clearly "service connected," the accused must be tried by civilian courts where he would be afforded constitutional guarantees such as the right to trial by jury.⁵⁹

The conclusion that article III, § 2, and the sixth amendment, as well as the due process clause of the fifth amendment, do not apply to military courts has gone relatively unchallenged for over a hundred years despite questionable precedential support. Examined closely, the arguments used in support of this doctrine are not persuasive. One such argument, given by Chief Justice Stone in *Quirin*, is that the right to trial by jury was intended to be limited to the rights granted at common law.⁶⁰ Since jury trial was not a right of the military under the common law, the Constitution does not now guarantee trial by jury to the military.⁶¹ The notion that the right to jury trial is frozen in those situations in which there was a right to a jury at common law is no longer acceptable,⁶² and had, in fact, been rejected in *Glasser v. United States*,⁶³ which was decided before *Quirin*. The Court stated in *Glasser*:

[E]ven as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what proper a jury is have developed in harmony with our basic concepts of a democratic society and a representative government.⁶⁴

Chief Justice Stone's view that trial by jury was historically unavailable to the military⁶⁵ rests in part upon a misconception as to the

58. *Id.* at 261 (emphasis added).

59. For the significance of the service connection holding in *O'Callahan* see notes 128-31 *infra* & text accompanying.

60. See Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 971 (1926), arguing that the sixth amendment has no force independent of history.

61. 317 U.S. at 40.

62. *Williams v. Florida*, 399 U.S. 78 (1970); *Baldwin v. New York*, 399 U.S. 66 (1970). See also *Bloom v. Illinois*, 391 U.S. 194 (1968), holding that a jury trial is now required in certain criminal contempts.

63. 315 U.S. 60 (1941).

64. *Id.* at 85. See also *Eubanks v. Louisiana*, 356 U.S. 584, 588 (1958): "But local tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of the laws."

65. The view has been shared by courts and writers. *Kahn v. Anderson*, 255 U.S.

status of court-martial jurisdiction when the Constitution was ratified. At the time of ratification the military did not have authority to try members of the armed forces for civilian crimes. Therefore, servicemen were tried by civilian juries for civilian crimes, and, therefore, trial by jury was available in most cases to members of the armed forces. Congress first authorized military trial of soldiers for "civilian" crimes in 1863, and even then such trials were permitted only in wartime.⁶⁶ In peacetime soldiers were still tried by civilian courts for civilian crimes.⁶⁷ Thus, even if one were to accept the theory of the Supreme Court in *Quirin* that right to trial by jury was "frozen at common law," the right to trial by jury could only be denied persons accused of "military" crimes,⁶⁸ since at common law non-military offenses were usually tried by civilian jury.⁶⁹

It has also been argued that the relatively small number of men in the armed services when the Constitution was ratified indicates that the framers had little reason to be concerned with due process in the military.⁷⁰ Therefore, the argument goes, the military was excluded from the Bill of Rights, and there is no right to trial by jury today. The disparity between the numbers of servicemen then and now, however, might well lead one to the opposite conclusion. If, in fact, the framers

1, 8-9 (1920); *Ex parte Reed*, 100 U.S. 13 (1879); Henderson, *supra* note 44; Wiener, *supra* note 44.

66. Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 731, 736. The civilian-type crimes which were added by this Act were the common law crimes of larceny, murder, assault, battery and rape. The "wartime" restriction was not removed until 1916. Act of Aug. 29, 1916, ch. 418, § 1342, art. 96, 39 Stat. 666. For a discussion of the relationship between the military and civilian courts at common law, see *Reid v. Covert*, 354 U.S. 1, 23-30 (1957), *O'Callahan v. Parker*, 395 U.S. at 268-70 (1969). See also F. WIENER, *CIVILIANS UNDER MILITARY JUSTICE* (1967).

67. 2 J. CAMPBELL, *LIVES OF THE CHIEF JUSTICES* 91 (1st ed. 1849). See *Reid v. Covert*, 354 U.S. at 24 n.44. The experience of the common law was a constant battle to preserve itself from encroachment by the military. See 1 C. CLODE, *MILITARY FORCES OF THE CROWN*, 19-21, 55-61, 76-78, 142-66, 499-501, 519-20 (1869).

68. "Military" offenses include absence without leave, desertion and refusal to obey an order. Theft, even of military materials, is a civilian crime. In fiscal 1967, four times as many trials for non-military offenses as for military offenses occurred in the Air Force. USAF, *ANNUAL REPORT OF COURT-MARTIAL ACTIVITIES FROM THE JUDGE ADVOCATE GENERAL* (1968). In the other services, military offenses usually outnumber civilian offenses. During 1968, of 2,441 Army general courts-martial, 2,113 civilian and 2,471 military offenses were tried. Letter from Stanley Rubinowitz, Chief of the Examination and New Trials Division, Army Judiciary, to author, May 6, 1969. In the years 1969 and 1970 the Navy Judge Advocate General reviewed a total of 12,128 offenses. Of these, 2,936 were civilian and 9,192 were military. Several offenses might be tried before one court. Letter from Capt. K. A. Konopisos to author, May 10, 1971.

69. Until passage of the UCMJ in 1950, an Army court-martial had no jurisdiction over a murder or rape within the continental United States in peacetime. Compare 62 Stat. 604, 640 (1948) with UCMJ, art. 118, 10 U.S.C. § 918 (1970).

70. Wiener, *supra* note 44, at 8-13.

were willing to forego a substantial right for a few thousand⁷¹ servicemen tried for "military" offenses (and it is far from clear the framers meant to do so), they still may not have been willing to have the same result apply when, as today, there are over three million men in the armed services.⁷²

Another questionable argument is that the intent of the framers of the Constitution was to exclude the military from the right to a jury trial. Therefore, the argument goes, article III, § 2, must be read as if it did not include the military, while the exclusionary clause of the fifth amendment applies by implication to the sixth amendment.⁷³ This contention is based on the fact that the proposals of Massachusetts, New Hampshire and New York concerning the Bill of Rights excluded the military from the jury trial guarantees⁷⁴ and that Madison's proposal would have done the same.⁷⁵ However, this argument runs counter to normal rules of statutory construction. Since article III, § 2, specifically excepts cases of impeachment from the jury trial guarantee, yet does not except the military, the normal conclusion would be that the drafters intended that all those cases which were to be excepted were specifically described and that all other cases would be included. As for the Bill of Rights, the fact that the framers made a specific exception in the fifth amendment, yet did not in the sixth, would indicate that the military was not to be excepted from the operation of the sixth amendment.⁷⁶

The framers of the Constitution were aware of the possibility of including specific exceptions of the military from article III and the sixth amendment, for their proposals included such exceptions, and such an exception was written into the fifth amendment. The fact that the final language adopted in these provisions did not include such exceptions indicates an intentional effort to include the military.⁷⁷ It is normally

71. *Id.* at 9, citing E. UPTON, *THE MILITARY POLICY OF THE UNITED STATES* 83 (1912).

72. BUREAU OF CENSUS, DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES*, table 393, at 260 (91st ed. 1970) [hereinafter cited as *ABSTRACT*].

73. See note 44 *supra*.

74. MASS. CONST. pt. 1, art. XII (1780); N.H. CONST. pt. 1, arts. XV, XVI (1783); 1 J. ELLIOTT, *ELLIOTT'S DEBATES* 328 (2d ed. 1836) (New York proposal) [hereinafter cited as *ELLIOTT'S DEBATES*]. The Maryland proposal excluded the military from other guarantees as well. 2 *id.* at 550. Other proposals failed to make any exception for the military.

75. See Henderson, *supra* note 44, at 310.

76. See generally 2 J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* §§ 4502, 4505-06, 4915-17 (3d ed. 1943).

77. In *Duncan v. Louisiana*, 391 U.S. 145, 153 n.20 (1968), the Supreme Court assumed that a similar failure to adopt a specific right to jury trial in state criminal cases indicated that the sixth amendment was not intended to bind the states. Similarly, servicemen ought not to be bound by a proposed and rejected exclusion.

a questionable practice to read exceptions into constitutional or statutory language.⁷⁸ But it is particularly questionable to go beyond the clear language of the Constitution when, as here, the history is ambiguous and the effect is to bar more than three million United States citizens from the fundamental, twice-guaranteed,⁷⁹ right to trial by jury in all criminal cases. The reasoning of the cases hardly seems sufficient to justify denying constitutional rights which the Court recently declared "fundamental to the American scheme of justice."⁸⁰

ARTICLE III, THE SIXTH AMENDMENT AND
FIFTH AMENDMENT EQUAL PROTECTION

The ease with which the Supreme Court has dealt with the article III and sixth amendment rights to trial by jury in the military is at variance with its serious examination of the elements of the right to jury trial in civilian areas. In *Duncan* the Court overturned a century of precedent to hold that the sixth amendment right to trial by jury is applicable to the states through incorporation into the fourteenth amendment. In *Bloom v. Illinois*,⁸¹ the right to a jury in serious contempt cases was reaffirmed, giving rise to an inference that any sentence of confinement for more than six months would require a jury verdict. In *Baldwin v. New York*,⁸² a New York City ordinance denying jury trials in misdemeanors was invalidated. The Court stated:

[N]o offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment for more than six months is authorized.⁸³

In the military sphere, however, deference to the vague and ill-defined notion of "military necessity" has led the Court to maintain a hands-off attitude toward jury trial. The Court's stated unwillingness to interfere with the powers granted Congress under article I, § 8, has resulted in what may well be a failure to perform its own judicial duties under article III. If the two constitutional mandates were in direct conflict and the extension of the right to trial by jury to servicemen

78. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840). See also *Williams v. United States*, 289 U.S. 553, 572-73 (1933); *Myers v. United States*, 272 U.S. 52, 151 (1926); *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3, 25 (1964) (dissenting opinion).

79. For a discussion of the interaction between article III, § 2, and the sixth amendment, see *Williams v. Florida*, 399 U.S. 78, 93-96 (1970).

80. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

81. 391 U.S. 194 (1968).

82. 399 U.S. 66 (1970).

83. *Id.* at 69.

would actually result in drastic interference with the national defense mission of the armed forces, then arguably the jury right should give way. Mere inconvenience or additional expense, on the other hand, would not seem to justify denial of rights twice-guaranteed all citizens. The court has never attempted to determine what effect trial by jury would have on the military mission or the extent to which the current system could be modified to meet constitutional standards without interfering unduly with that mission.

The right of a civilian to an impartial jury is a settled question. In a long line of cases, the Supreme Court has held that intentional exclusion of blacks from state and federal juries is violative of the due process and equal protection clause of the fourteenth amendment.⁸⁴ There was no statutory bar in these cases to the presence of blacks on juries, but the method of selection by local officials had operated to exclude or to limit severely participation by blacks. Nor is the requirement of an impartial fact finder limited to a prohibition on racial discrimination.⁸⁵ In *Thiel v. Southern Pacific Co.*,⁸⁶ the Supreme Court exercised its supervisory powers⁸⁷ to prohibit discrimination against wage earners, holding that:

Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this

84. See *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Reece v. Georgia*, 350 U.S. 85 (1955); *Cassell v. Texas*, 339 U.S. 282 (1950); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Hollins v. Oklahoma*, 295 U.S. 394 (1935); *Norris v. Alabama*, 294 U.S. 587 (1935); *Bush v. Kentucky*, 107 U.S. 110 (1883); *Neal v. Delaware*, 103 U.S. 370 (1881); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

For further discussion of civilian juries, see Kubin, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968); Note, *The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069 (1966).

85. See, e.g., *Tumey v. Ohio*, 273 U.S. 510 (1927) (judge had financial interest in outcome); *Leonard v. United States*, 378 U.S. 544 (1963) (jury witnessed announcement of defendant's guilt in another case); *Irvin v. Dowd*, 366 U.S. 717 (1961) (prejudicial publicity); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966), cert. denied, 386 U.S. 991 (1967) (exclusion of wage earners). *United States v. Hedges*, 11 U.S.C.M.A. 642, 29 C.M.R. 458 (1960) (preponderance of law enforcement officers on court). See also Hart, *The Case for Federal Jury Reform*, 53 A.B.A.J. 129 (1967).

86. 328 U.S. 217 (1946).

87. Although *Thiel* was a civil case, the Supreme Court has also exercised its powers of supervision over the lower federal courts in criminal cases. *McNabb v. United States*, 318 U.S. 332 (1943).

nature . . . [w]e would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do.⁸⁸

In *Labat v. Bennett*,⁸⁹ the Fifth Circuit, sitting en banc, held that the principle enunciated in *Thiel* is constitutionally required.⁹⁰

In 1968, Congress passed the Jury Selection and Service Act,⁹¹ which provides that all jurors in the federal district courts be selected at random without regard to "race, color, religion, sex, national origin, or economic status."⁹² In doing so, Congress codified case law setting out constitutional requirements in the area of jury selection.

DUE PROCESS AND EQUAL PROTECTION REQUIREMENTS IN THE MILITARY COURTS

The due process and incorporated equal protection clause of the fifth amendment have been applied by the Court of Military Appeals so as to extend to servicemen many of the guarantees of the Bill of Rights.⁹³ The court has held that only the dictates of "military necessity" will limit the application of the first ten amendments to the military.⁹⁴ In *United*

88. *Id.*, at 223-24. In *Ballard v. United States*, 329 U.S. 187 (1946), the Court held that systematic exclusion of women violated the statutory requirement of a cross-section of the community.

89. 365 F.2d 698 (5th Cir. 1966), *cert. denied* 386 U.S. 991 (1967).

90. The Court of Appeals of Georgia similarly interpreted *Thiel* in terms of the due process and equal protection clauses of the 14th amendment, holding that due process requires selection from a full cross section of the community. *Allen v. State*, 110 Ga. App. 56, 137 S.E.2d 711 (1964). See also *State v. Madison*, 240 Md. 265, 213 A.2d 880 (1965); *Schowgurow v. State*, 240 Md. 121, 213 A.2d 475 (1965).

91. 28 U.S.C. § 1861 *et seq.* (1970).

92. 28 U.S.C. § 1862 (1970).

93. The due process rights which have been extended include the right to a public trial, *United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956); the right against self-incrimination, *United States v. Kemp*, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962); the right to confront witnesses, *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); right to counsel, *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); right against unreasonable searches and seizures, *United States v. Vierra*, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963); right of compulsory process, *United States v. Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964); right to a speedy trial, *United States v. Schalck*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964); right to *Miranda* warnings, *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); and (theoretically) jury selection not arbitrarily and deliberately discriminatory, *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964).

94. See, e.g., *United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956) (public trial); *United States v. Soto*, 16 U.S.C.M.A. 583, 37 C.M.R. 203 (1967) (search and seizure). For a review of military due process, see Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. REV. 1240 (1968); Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service*, 35 NOTRE DAME LAW. 491 (1960); Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1960). See also Warren,

States v. Jacoby,⁹⁵ a 1960 case holding the sixth amendment right to confrontation of witnesses applicable to the military, the Court of Military Appeals stated:

[I]t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.⁹⁶

In *United States v. Tempia*⁹⁷ the court firmly established the direct applicability of the Bill of Rights to servicemen:

The time is long since past . . . when this court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights.⁹⁸

In the area of jury guarantees the due process clause of the fifth amendment would seem to require that the accused serviceman be granted an impartial court drawn from a cross-section of the population. Most state and federal jury cases have not been decided on the basis of article III, § 2, or the sixth amendment but on the "due process" and "equal protection" clauses of the fifth and fourteenth amendments.⁹⁹ The teaching of these cases is that once a system of trial by jury is established, due process requires that no class or group be deliberately excluded, particularly members of an identifiable class to which the accused belongs. To deny an accused enlisted man trial by a jury of his peers while giving such a trial to an officer is a denial of equal protection "so unjustifiable" as to constitute a violation of the fifth amendment due process clause.¹⁰⁰ The lower rank enlisted person is in much the same

The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181 (1962). For a review by a commentator unhappy about the extension of constitutional guarantees to the military, see Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127 (1964). For a comprehensive review of military procedural due process, see *Civilianization*, *supra* note 12.

95. 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

96. *Id.* at 430-31, 29 C.M.R. at 246-47.

97. 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

98. *Id.* at 633, 37 C.M.R. at 253. See also *Burns v. Wilson*, 346 U.S. 137 (1953); *In re Stapley*, 246 F. Supp. 316 (D. Utah 1965) (right to counsel where charges substantial). *Contra*, *Kennedy v. Commandant*, 377 F.2d 339 (10th Cir. 1967).

99. It was not until *Duncan* (1968) that the Supreme Court held the sixth amendment right to trial by jury to be such a "fundamental" right that it was directly incorporated into the fourteenth amendment.

100. Fourteenth amendment equal protection standards arguably apply to purely federal matters like those under discussion. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court, in considering racial segregation in the public schools of the District of Columbia, said:

But the concepts of equal protection and due process, both stemming from our

position as those who are discriminated against on the basis of race, economic status or any other factor which bears no substantial relation to an ability to function as a juror.

In 1964, the Court of Military Appeals was confronted in *Crawford*¹⁰¹ with the issue of due process requirements in the military jury context. In *Crawford*, a private (E-2) was convicted by a court in which the only enlisted members were three sergeants major (E-9) and one master sergeant (E-7). The accused contended that the selection process violated due process in that all enlisted personnel lower than E-7 were arbitrarily and discriminatorily excluded from court membership.¹⁰² The court held that the due process clause must be applied to the manner of selection of military courts. Both the majority and the dissent agreed that "[c]onstitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the facts."¹⁰³ The court held, however, that a showing of systematic exclusion had not been made.

One reason for the court's conclusion was the administrative difficulty of considering servicemen other than senior enlisted personnel. The court took judicial notice that many enlisted men below the senior enlisted ranks would qualify under the article 25(d)(2) criteria, but suggested that such individuals could not be found without a "substantial preliminary screening"¹⁰⁴ made necessary by the large numbers who would not qualify. The military necessity of expending a minimum amount of time and effort in the selection process made the systematic exclusion of lower ranking enlisted personnel reasonable.¹⁰⁵ Thus, although *Crawford* affirmed the application of the due process clause to the military in the matter of court selection, it found administrative con-

American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of the law," and, therefore, we do not imply that the two are always interchangeable phrases. But, . . . discrimination may be so unjustifiable as to be violative of due process.

Id. at 499.

101. A study conducted by Crawford's counsel is discussed in note 18 *et seq. supra* & text accompanying.

102. *Id.* at 35, 35 C.M.R. at 7. Appellant also contended that a black was arbitrarily included, but the court found no error in this. *Id.* at 41, 35 C.M.R. at 13.

103. *Id.* at 34, 35 C.M.R. at 6.

104. *Id.* at 40, 35 C.M.R. at 12.

105. The court further noted:

[There is] a general understanding that the relationship between the prescribed qualifications for court membership, especially "training, experience, and length of service," and seniority of rank is so close that the probabilities are that those in the more senior ranks would most often be called upon to serve.

Id. at 40, 35 C.M.R. at 12.

venience to be a factor which could be considered in defining the degree of due process required.

Decisions since *Crawford* which have broadened the scope of due process in the military, the increase in the educational level of enlisted personnel,¹⁰⁶ and the Court of Military Appeals' 1970 decision in *United States v. Greene*¹⁰⁷ suggest that the court might take a closer look at the composition of courts-martial with enlisted members if the issue were presented today. In *Greene*, the court considered a challenge to a panel which consisted of senior members. In that case, however, the court was an all-officer panel whose members were specifically limited to lieutenant colonel and above. In a unanimous opinion, the court held that such an exclusion of lower grade officers was impermissible. Although the facts showed direct interference by the office of the Staff Judge Advocate in a previously chosen court which included lower grade officers, *Greene* is hardly distinguishable from *Crawford*. Having admitted in *Greene* that the greater age, experience, training and length of service of senior officers are not sufficient grounds to justify exclusion of junior grade officers, the court will be hard put not to hold the same for situations involving enlisted men. To uphold the exclusion of lower ranked enlisted men after *Greene* would be to hold, in effect, that their status as enlisted men ipso facto makes their education and judicial temperament insufficient for service on courts. Such a conclusion, in today's highly educated service, would be difficult to support.

The wide discretion given the convening authority to choose court-members from within military ranks has been upheld consistently by the Court of Military Appeals.¹⁰⁸ Even if a cross-section of all ranks were required, a convening authority or his subordinates could choose men known to be service-oriented in outlook or those with "career potential."¹⁰⁹ Without stronger evidence of command exclusion of non-career personnel than that of failure to appoint from their ranks, it is doubtful that the selection process from within ranks could be successfully challenged. Although random selection of courts is not compelled under current Supreme Court interpretation of the due process clause,¹¹⁰

106. See note 133 *infra* & text accompanying.

107. 20 U.S.C.M.A. 232, 43 C.M.R. 72 (1970). See also the decision of an Army Court of Military Review in *United States v. Jacobson*, 39 C.M.R. 516 (1968).

108. *Green v. Convening Authority*, 19 U.S.C.M.A. 576, 42 C.M.R. 178 (1970); *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964). The court has not, however, examined the propriety of delegating court-member selection to the convening authority's subordinates under procedures like those followed in the *Flint* case, described in notes 30-37 *supra* & text accompanying.

109. See note 35 *supra*.

110. The Supreme Court has recently upheld statutes in Georgia and Alabama

that method would appear to be the only effective means of preventing discrimination in the selection of members from within the ranks.

MILITARY NECESSITY

The Court of Military Appeals has expressly held "military necessity" to be a limit upon the application of the due process clause to the military.¹¹¹ Similarly, the implication of the Supreme Court cases discussed earlier is that military necessity prevents the application of traditional trial-by-jury requirements to military justice. The jury guarantees of article III and of the sixth amendment, and particularly those of the due process clause of the fifth amendment can, however, be constitutionally limited, if at all, only to the extent actually required by the special nature of the military mission. Therefore, to determine whether there is a right to jury trial and whether full due process rights under the fifth amendment should apply, it is necessary to examine the probable effects of increased participation by enlisted men in jury trials on both the administration of military justice and on military discipline. Moreover, such a discussion may aid in determining the wisdom and potential scope of future congressional action in this area.

Trial by jury in the federal court system means trial by a twelve member jury which can convict or acquit only with the unanimous agreement of the twelve jurors. The military requires a minimum of only three court members for special courts-martial and five for general courts-martial.¹¹² Although a unanimous vote is required to convict a serviceman of a crime for which death is the mandatory punishment,¹¹³ and a three-fourths vote is required if a sentence in excess of ten years is mandatory,¹¹⁴ only a two-thirds majority is required for other guilty verdicts.¹¹⁵ If twelve member juries and unanimous verdicts were required

granting broad discretion to jury commissioners in the selection of panels. In *Carter v. Jury Comm'r*, 396 U.S. 320 (1970), the Court upheld an Alabama statute calling for jurors "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for their integrity, good character, and sound judgment." *Id.* at 323. In *Turner v. Fouche*, 396 U.S. 346 (1970), a Georgia statute requiring selection based on intelligence was upheld on its face, even though its application was unconstitutional. In both cases the duty to show the statute was not administered in a discriminatory manner was placed on the state.

The similarity of the criteria upheld in *Carter* and those of article 25(d) (2) suggests that the Supreme Court would not find article 25(d) (2) unconstitutional on its face.

111. *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

112. UCMJ, art. 16, 10 U.S.C. § 816 (1970). As a practical matter, special courts usually have at least four or five members and general courts at least seven or eight.

113. UCMJ, art. 52(a) (1), 10 U.S.C. § 852(a) (1) (1970).

114. UCMJ, art. 52(b) (2), 10 U.S.C. § 852(b) (2) (1970).

115. UCMJ, art. 52(a) (2), 10 U.S.C. § 852(b) (2) (1970).

of the military there could be some impact on the military mission. Twelve-member juries would require more members for court duty, especially if there were to be an increase in requests for trials by full courts. Additionally, the requirement for a unanimous verdict would undoubtedly result in an increase in the number of hung juries, thus necessitating the time and expense of new trials.¹¹⁶

However, in a 1970 decision, *Williams v. Florida*,¹¹⁷ the Supreme Court held that a twelve-member jury is not constitutionally required in criminal cases in state courts and suggested that it may only be a matter of time before the Court holds that unanimous verdicts are not required.¹¹⁸ In upholding the Florida six-man jury statute, the Court found "absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury."¹¹⁹ After a lengthy review of the constitutional and historical basis of the jury guarantees, Mr. Justice White concluded:

Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial.¹²⁰

The Court found nothing in the traditional role of the jury which required that it be composed of twelve members. As Justice Harlan wrote in dissent:

The necessary consequence of this decision is that 12-member juries are not *constitutionally* required in *federal* criminal trials either.¹²¹

Justice Harlan also noted that the Court's analysis and conclusions in

116. It has also been argued that unanimous verdicts would result in more compromise verdicts, thus permitting more accused servicemen to get off with lenient sentences. Haralson, *Unanimous Jury Verdicts in Criminal Cases*, 21 Miss. L.J. 185 (1950). But compromise verdicts can as often work against an accused, producing a conviction when reasonable doubt exists in the minds of at least some jurors.

117. 399 U.S. 78 (1970).

118. The Court has the issue before it in *Apodaca v. Oregon*, 400 U.S. 901 (1970), noting *prob. juris.* in *State v. Apodaca*, 1 Ore. App. 484, 462 P.2d 691 (1969).

119. 399 U.S. at 99.

120. *Id.* at 99-100.

121. *Id.* at 118 (emphasis in original). Although Mr. Justice Harlan's statement is persuasive, the question will not be decided until federal courts are authorized juries of fewer than twelve members.

regard to the requirement of twelve-member juries are hardly distinguishable from those which apply to the constitutional requirement for unanimous verdicts. There is little in the function of the unanimous verdict which makes it any more sacrosanct than the twelve-member jury. The due process clause, however, undoubtedly places some limitations on the extent to which Congress and the states can move away from the traditional concept of a twelve-member, unanimous-verdict jury. A three-member jury which can convict by a one-third vote might appear constitutionally permissible under the logic of *Williams*, but it would make such a sham of trial by jury that it would probably be considered a violation of due process. *Williams* suggests, however, that the current military minimum of five general court-martial jurors deciding by a two-thirds verdict might still be constitutionally permissible if the article III and sixth amendment jury guarantees were to be applied to the military.¹²²

The strict application of traditional jury trial guarantees to the military require significant changes in the current structure of trial by special courts-martial. In *Baldwin v. New York*,¹²³ decided the same day as *Williams*, the Supreme Court held that jury trials are required only where penalties in excess of six months are authorized. Only Justices Black and Douglas would have required jury trials where penalties of six months or less are authorized. If jury trial were a matter of right to servicemen, *Baldwin* would require only special courts-martial adjug-

122. But see Larkin, *Should the Military Less Than Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237 (1971) [hereinafter cited as Larkin]. Prof. Murl Larkin, whose article was apparently written before *Williams* was decided, argues that the less-than-unanimous verdict constitutes an erosion of the standard of reasonable doubt sufficient to constitute a denial of due process. "[P]roof beyond a reasonable doubt and a unanimous verdict requirement appear to be complementary safeguards of due process." *Id.* at 244. Prof. Larkin cites a juvenile case, *In re Winship*, 397 U.S. 358 (1970), which holds, according to Larkin, "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt." Larkin, *supra* at 242. The rule permitting juries of fewer than twelve members, however, would appear to constitute as much an erosion of the standard of reasonable doubt as the less-than-unanimous verdict, and the Supreme Court has strongly implied that jury trial is not necessary to insure the viability of "reasonable doubt" by holding that jury trials are not constitutionally required in juvenile proceedings. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

Even if the unanimous verdict is an essential element of trial by jury and thus mandatory where jury guarantees apply, there is little evidence that introduction of unanimous verdicts would significantly interfere with military discipline. Larkin, *supra* at 251-58. Although Prof. Larkin may understate the impact of hung juries on the military, the increased expense of a small number of retrials would not seem sufficient to outweigh the importance of granting servicemen their right to trial by jury. Several bills which would require unanimous verdicts in the military have recently been introduced in the House. H.R. 7263, 7292, 7467, 92d Cong., 1st Sess. (1971).

123. 399 U.S. 66 (1970).

ing a bad-conduct discharge¹²⁴ to conform to current standards for trial by jury because of the serious nature of the potential penalty.¹²⁵ Since the number of Army special courts-martial empowered to adjudge a punitive discharge is relatively small,¹²⁶ requiring additional impartially selected court members would cause little administrative inconvenience. Navy, Marine and Air Force special courts-martial, however, are routinely empowered to adjudge punitive discharges. If jury standards were applied to the military, these courts would have to comply with federal requirements or stop issuing punitive discharges.

Other administrative difficulties might be raised by the due process requirement that members of all courts, whether or not the courts are convened under the requirements of article III and the sixth amendment, be chosen in an impartial manner. In fact, however, an impartial and random selection system such as that used in the federal courts would appear to be as easy or easier to administer than the current court martial selection system which requires the convening authority personally to select those of his command who are "best qualified" for court-martial duty. Its administration would also require less time and manpower than the current, improper practice of delegating the selection process to subordinates.

Initially, with a random system, an increased administrative burden can be expected, since a more representative system could probably result in more requests for jury trials.¹²⁷ However, despite some additional manpower requirements and expenses, it is likely that the military can successfully cope with this situation.

In assessing the effect of trial by a more representative and randomly-selected jury upon discipline in the armed services, it is important to recognize that there are two major categories of crimes tried by military courts. The majority of cases involve purely military offenses such as

124. For the procedures currently required to convene a special court-martial capable of adjudging a bad conduct discharge, see *MANUAL*, *supra* note 12, at ¶ 15(b). See also art. 19, 10 U.S.C. § 819, which requires a "complete record of the proceedings and testimony."

125. The Court of Military Appeals has held that a reviewing authority or lower court on rehearing may substitute as much as one year's confinement for a bad conduct discharge if the total confinement is not in excess of that which the court could have given initially. *Jones v. Ignatius*, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968); *United States v. Darusin*, 20 U.S.C.M.A. 354, 43 C.M.R. 194 (1971). Although a special court-martial is still limited to six months confinement, the cases emphasize the strong punitive nature of a bad conduct discharge.

126. See text accompanying note 92 *supra*.

127. In 1968, 65 per cent of federal defendants who contested guilt exercised their right to trial by jury. ADMIN. OFFICE OF THE U.S. COURTS, *FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS* 6 (1968).

absence without leave, disobedience of orders and disrespect to superiors. The second category of cases are civilian in nature and include such offenses as theft, assault, and murder. In some cases the crimes may be both military and civilian in nature, such as an assault upon an officer by an enlisted man.

In *O'Callahan v. Parker*,¹²⁸ the Supreme Court first considered whether the demands of military discipline justified the practice of trying servicemen by courts-martial for civilian offenses. The Court's primary concern was the failure of courts-martial to provide trial by jury. In *O'Callahan* an Army sergeant was charged with the assault and attempted rape of a girl in a hotel in Honolulu. At the time of the offense he was off duty and in civilian clothes. In determining whether there was military jurisdiction to try the offense, the Court characterized courts-martial as "a specialized part of the overall mechanism by which military discipline is preserved."¹²⁹ The Court added the "the justification for such a system rests on the special needs of the military, and . . . expansion of military discipline beyond its proper domain carries with it a threat to liberty."¹³⁰ It went on to declare that unless an offense is clearly "service-connected" the military has no authority to try the case and concluded that the Army had no jurisdiction to try *O'Callahan*. Subsequent decisions by the Supreme Court and the Court of Military Appeals have found disciplinary interests in a broad range of civilian offenses thereby limiting the application of *O'Callahan*.¹³¹ Consequently, most servicemen accused of civilian offenses are still tried under a system which is designed to discipline persons accused of military offenses.

The argument that the needs of military discipline outweigh the

128. 395 U.S. 258 (1969).

129. *Id.* at 265.

130. *Id.*

131. The Court of Military Appeals has guarded military jurisdiction jealously by giving a broad construction to the service connection test and limiting the situations in which civilian offenses under *O'Callahan* must be tried in civilian courts. Situations still considered service-connected include on-post offenses, *Relford v. Commandant*, 401 U.S. 355 (1971); *United States v. Smith*, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969); most off-post drug offenses, *United States v. Beeker*, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969); offenses in which only servicemen are involved, *United States v. Lovejoy*, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970); and military rank is used to facilitate the crime, *United States v. Haagenon*, 19 U.S.C.M.A. 332, 41 C.M.R. 332 (1970).

In *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969), the court held that petty offenses are triable in military courts. Also, servicemen in Vietnam are amenable to military jurisdiction for all crimes since no other United States court has jurisdiction. Vietnam has waived jurisdiction under a Status of Forces of Agreement. *Mutual Defense Assistance in Indochina*, with France, Cambodia, Laos and Vietnam, Dec. 23, 1950, [1952] 2 U.S.T. 2756, T.I.A.S. No. 2447.

right to trial by jury is somewhat stronger in regard to military offenses, but it may not be sufficiently compelling to support the denial of jury protections. The argument is simple: enlisted personnel serving as court members will not understand the needs of military discipline and will tend to acquit or give more lenient sentences to persons accused of military offenses than would officers, senior non-commissioned officers, or military judges. Therefore, enlisted personnel will commit more military offenses and discipline will suffer. The argument has some logical force but it rests on the unproven assumption that discipline is best maintained by the threat of punishment. Furthermore, it underrates the ability of the modern enlisted man to carry out his responsibilities intelligently as a court member and misunderstands him as a potential offender. It also fails to take into account the feelings of the average enlisted man who will never come into contact with a court-martial.¹³²

YOUNG ENLISTED MEN AS COURT MEMBERS

The modern armed forces is an educated and increasingly technical society. Fewer than ten percent of Army servicemen have infantry MOS's (Military Occupational Specialties), and perhaps another five percent are in unskilled service occupations.¹³³ With a minimum of constitutionally permitted screening¹³⁴ and a liberal challenge procedure,¹³⁵ the enlisted ranks, including combat and infantry troops, can be expected to produce jurors who understand issues, who will obey the law and the instructions of the judge and who will fairly and honorably represent the military community.

Although the presence of lower-ranked enlisted men on courts-

132. Prof. Edward F. Sherman notes that:

[C]riticism is often heard among enlisted men that the court martial is a "kangaroo court" Allowing enlistees to serve on courts-martial would go a long way toward restoring their confidence in the military justice system.

Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25, 45 (1971) [hereinafter cited as *Proposals*].

133. In 1967, of 2,375,000 enlisted military personnel, 7.8 per cent had infantry MOS's. Another twelve per cent had service MOS's including motor transport, food and security, and somewhat more than half of service MOS's would be semi-skilled. ABSTRACT, *supra* note 72, table 393, at 260. Infantry specialties call for more skill in handling sophisticated weaponry than ever before, and despite the Vietnam war, basic induction standards remain high. In 1969, only 55 per cent of draftees were found to meet physical and mental standards for induction. *Id.*, table 398, at 263.

134. A requirement of one year's prior service, for example, would be a valuable selection device.

135. A minimum of three peremptory challenges would be desirable, with more for serious offenses. Each party is currently entitled to one peremptory challenge in both special and general courts-martial. UCMJ, art. 41(b), 10 U.S.C. § 841(b) (1970).

martial is rare, the author has appeared before four courts-martial¹³⁶ in which enlisted men in grades E-4 or E-5 or both were members. In these cases the convening authority was persuaded that appointing young enlisted men would be a useful experiment. Although it is impossible to generalize, these cases seem to have much in common and to illustrate the feasibility and desirability of participation by enlisted men of lower ranks in courts-martial. After three of these cases the court members discussed the factors which they considered in their deliberations.¹³⁷ They indicated no reluctance to convict once the government had met its burden of proof. In all four cases it was obvious that the court members took their duties seriously. They remained sharply attentive throughout the trial, particularly during final argument and instructions. They all took notes throughout the trial and asked intelligent questions of witnesses. At no point did the court members give any indication that the accused would be given special consideration because they were enlisted men. On the other hand, it is equally clear that the testimony of commissioned and senior non-commissioned officers was given no greater weight because of their rank.

Of these cases, that of *United States v. Rollins*,¹³⁸ is particularly instructive. Rollins was charged with assaulting a command sergeant major and with refusing to identify himself. He was tried before a special court-martial convened at Long Binh Post, Vietnam in October, 1971. The convening authority agreed to a defense request that the members of the court be chosen at random without regard to rank. Using social security numbers and dates of rotation from Vietnam as guides, the staff judge advocate and a computer programmer came up with nine nominees. The convening authority removed those who he felt did not meet article 25(d)(2) criteria and those in essential jobs. The final panel consisted of one major, one captain, one E-7 (a sergeant first class), three E-5's, and three E-4's. After challenges the jury was reduced to five members: two sergeants (E-5) and three specialists (one E-5 and two E-4's). Although the selection process was not entirely random, the convening authority demonstrated that courts can be randomly selected

136. *United States v. Bell*, U.S. Army Court-Martial Convening Order No. — (1971) [on file at 35th Engineer Group, Cam Ranh Bay, Vietnam]; *United States v. Rollins*, U.S. Army Court-Martial Convening Order No. 63 (1971); *United States v. Woodmancy*, U.S. Army Court-Martial Convening Order No. — (1971) [or file at HQ, XXIV Corps, Danang, Vietnam]; *United States v. Sayles*, U.S. Navy Court-Martial Convening Order No. — (1971) [on file at Naval Support Activity Group, Saigon, Vietnam].

137. These members did not violate their oaths not to reveal the vote of any member.

138. See note 136 *supra*.

consistent with the current provisions of the UCMJ.

At trial Rollins testified that he had been grabbed from behind and had struck the sergeant major in instinctive self-defense. The sergeant major denied ever having touched Rollins but admitted to having signed a statement only hours after the event in which he had admitted touching and grabbing Rollins before being struck. The jury deliberated approximately one hour and returned a finding of not guilty as to both charges. The jury then asked the judge for permission to explain its findings and, without revealing individual votes, the members intelligently discussed the facts of the case and the law as they understood it. The judge later stated that the verdict was clearly "supported by the evidence."¹³⁹

Significantly, the convening authority in *Rollins* later agreed to continue to use courts chosen at random with heavy enlisted representation. He indicated that the effect on discipline of any increase in leniency with enlisted members might well be offset by increased enlisted respect for the judicial process and for the service itself.

It is not unreasonable to expect that sentences for military offenses might be somewhat lighter when adjudged by enlisted men who continuously face orders, some of them arbitrary in nature. Although some jurors sympathetic to military needs might feel that an accused should comply with all orders, much as the juror does himself, it is more likely that enlisted men would have greater sympathy for other enlisted men than would officers. But that is not to say that verdicts returned by juries including significant numbers of lower ranked enlisted men would not in fact be more just and wise than those returned by courts comprised of senior N.C.O.'s and officers. As Professor Edward F. Sherman points out, objections to the influence of enlisted court members go to the heart of the jury system itself:

Permitting an accused to be tried by a jury of his peers chosen at random always involves the possibility that jurors will be sympathetic to the accused, swayed by other members of the jury, or that they will not appreciate the purposes and objectives of the prosecution and the criminal laws. These qualities, however, are only objectionable if they prevent a juror from viewing a case with an open mind, and they have a valuable function in insuring trial by a jury whose members reflect the different experiences, attitudes, and class prejudices found in

139. TIME, Nov. 8, 1971, at 83.

the community. The court-martial comprised solely of officers is especially lacking in these qualities.¹⁴⁰

Even if enlisted court members were more lenient towards enlisted men than officers would be, what effect would such leniency have on discipline? The majority of military offenses are committed in the heat of the moment. Although at the time of committing an offense an enlisted man may be aware that there are penalties for such actions, it is unlikely that the possibility of a trial before a court-martial composed in part of his peers would have any effect upon his actions.¹⁴¹ Few soldiers actually see the effect of a court-martial sentence on a fellow soldier. Commanders often place an accused whom they consider to be a "trouble maker" in pre-trial confinement at the slightest provocation, thus isolating him from communication with members of his unit.¹⁴² Courts-martial often take two or three months from the commission of the alleged offense to the time of verdict. After the trial the offender is routinely transferred to another unit, regardless of the verdict. Thus, the average enlisted man has little knowledge of the outcome of court-martial trials and the sentences that are given. The presence of enlisted men on courts would seem, if anything, to increase the communication to others of the outcome of courts-martial and, in cases where a conviction was obtained, of the punishment given.

The fact that commanders have broad powers to maintain discipline without utilizing court-martial proceedings also would lessen any adverse impact of increased enlisted participation. In addition to his own personal

140. CIVILIANIZATION, *supra* note 12, at 97. A simple remedy for those who fear lighter sentences would be to place sentencing power in the hands of the judge. Such a move should only be permitted if judges are given truly independent status.

141. As Prof. Larkin, a retired Navy captain, writes in assessing the effect of unanimous verdicts on military discipline:

[T]he assertion that a person inclined toward a breach of discipline or insubordination would calculate so precisely his chances of escaping appropriate punishment ignores modern studies in criminology and criminal psychology.

Larkin, *supra* note 122, at 256.

142. The *Manual for Courts-Martial* prohibits pretrial confinement unless necessary to insure the presence of the accused at trial or because of the seriousness of the offense charged. *MANUAL*, *supra* note 12, ¶ 20(c). Although the Court of Military Appeals has held that "seriousness of the offense" may be considered only insofar as an accused might be tempted to flee, the court's decisions on factual situations have supported a far less discriminating use of pretrial confinement. *See, e.g.,* Horner v. Resor, 19 U.S.C.M.A. 285, 41 C.M.R. 285 (1970). At least one command has interpreted the phrase to permit pretrial confinement for offenses which might "seriously affect discipline." HQ United States Army Vietnam, Change 4, Supp. 1 to AR 27-10, ¶ 2-34(b)(1), June 21, 1971. Commanders have also been known to add a spurious charge of "communicating a threat" to an otherwise nonviolent disciplinary offense to ensure that an accused is placed in pretrial confinement.

powers of persuasion and leadership, the commander has available assignment of an individual to more or less pleasant duties; withholding of passes and privileges; granting of medals and letters of commendation; granting or preventing promotion; giving letters of reprimand; adjudging company and field grade "nonjudicial punishment";¹⁴³ and transferring a troublemaker to another unit.¹⁴⁴ When all else fails, the commander might institute elimination proceedings.¹⁴⁵ Nonjudicial punishment under article 15 of the UCMJ is an ideal disciplinary tool for a commander, since he is both accuser and judge. Although an accused may consult a military lawyer or retain civilian counsel, he has no right to have a military lawyer appear at the hearing. Maximum punishments imposable by company grade officers are up to seven days of correctional custody, seven days forfeiture of pay, reduction one grade in rank, fourteen days extra duty, fourteen days restriction, and fourteen days detention of pay.¹⁴⁶ Field grade officers may impose somewhat higher penalties: for example, a maximum of thirty days of correctional custody and reduction to the lowest enlisted pay grade.¹⁴⁷ Although an accused may decline to accept nonjudicial punishment and elect trial by court-martial, nonjudicial punishment remains a powerful disciplinary tool.¹⁴⁸

There is, as Professor Sherman writes, "a certain anachronistic ring to arguments that a commander needs to control courts-martial to obtain instant and unthinking response from his men and that any lessening of his powers would weaken his ability to maintain discipline."¹⁴⁹ Current reliance on the threat of court-martial may even have an adverse effect on discipline. The attitudes of enlisted men towards the military

143. UCMJ, art. 15, 10 U.S.C. § 815 (1970).

144. See, e.g., *MANUAL*, *supra* note 12, § 128(c).

145. These are proceedings to discharge a person from the armed forces with an honorable, general or undesirable discharge. See generally *DEPT OF ARMY, REG. 635-212* (1966).

146. UCMJ, art. 15(b), 10 U.S.C. § 815(b) (1970). Seamen aboard ship may be punished by a maximum of three days' confinement on bread and water as well.

147. UCMJ, art. 15(b), 10 U.S.C. § 815(b) (1970). Under normal circumstances, an enlisted man above grade E-4 may not be reduced by more than one grade. *MANUAL*, *supra* note 12, at § 131(b).

148. UCMJ, art. 15(a), 10 U.S.C. § 815(a) (1970). Although commanders do not always refer a refused article 15 offense to court-martial, refusing the article 15 involves the possibility of special court-martial proceedings, a risk which most servicemen do not choose to take. In addition to the substantially increased penalties possible from a special court-martial, the commanding officer can add other charges that might otherwise have been overlooked.

149. *Civilianization*, *supra* note 12, at 92. The American soldier is more articulate, skilled and educated than he has ever been. He is not the same man who fought in 1776, and he does not respond in the same way to disciplinary measures. For a discussion of the changing role of military discipline, see *id.* at 91-99. See also Larkin, *supra* note 122, at 251-58.

are often adversely affected by the actions of officers who attempt to gain respect through the threat of court-martial punishment. It is not unnatural to assume that threats alone can not maintain discipline. If, in fact, representative courts-martial weaken the effectiveness of the court-martial as a disciplinary tool, officers might be forced to rely more on earning the respect of their men than on crude displays of their court-martial powers. An officer who has the respect of his men and in turn, treats them with respect would be in a far better position to accomplish his military mission than one who relies solely on the threat of courts-martial.¹⁵⁰

The current military justice system as a whole does not command the highest respect either from the accused or from the great number of enlisted men who will never be charged under the UCMJ. Lower-ranked enlisted men complain, as did Justice Douglas in *O'Callahan*,¹⁵¹ that the court-martial system is a disciplinary tool of the commander and that court members are there to do his bidding. Whether or not such complaints are correct is irrelevant to the enlisted man's obvious lack of faith in the system. A fair representation of enlisted men, especially if coupled with other reforms, would do much to gain the confidence of lower rank servicemen in the military system of justice. It is logical to assume that such confidence will result in an increased respect for the military generally and a concomitant improvement of military discipline.

COURT SELECTION METHODS THAT MEET CONSTITUTIONAL REQUIREMENTS

It may be that the only effective means of insuring a serviceman's right to trial by a jury of his peers is to transfer jurisdiction over all crimes committed by servicemen to civilian courts. The transfer of jurisdiction over certain civilian and military offenses to the federal courts has been incorporated into reform proposals submitted by Senator Mark Hatfield (R.-Ore.).¹⁵² Congressman Charles Bennett (R.-Fla.)¹⁵³ and Senator Birch Bayh (D.-Ind.) have introduced bills calling for a

150. For a powerful story of discipline in any army whose officers had the respect of their enlisted men, see E. SNOW, *RED STAR OVER CHINA* (1938).

151. 395 U.S. at 265 (majority opinion).

152. S. 2183, 92d Cong., 1st Sess., § 821 (1971).

153. H.R. 579, 92d Cong., 1st Sess., § 1259 (1971); S. 1127, 92d Cong., 1st Sess., § 1259 (1971). Cong. Charles W. Whalen, Jr. (D.-Ohio) [H.R. 6901, 92d Cong., 1st Sess. (1971)] and Charles M. Price (D.-Ill.) [H.R. 2196, 92d Cong., 1st Sess. (1971)] have also introduced bills dealing with court selection. Their reforms in this area are similar to the Bayh, Bennett and Hatfield bills for general courts-martial, but they would leave special courts-martial essentially the same as in the present system. For further discussion of all five bills see *Proposals*, *supra* note 132.

study of the desirability of transferring certain military cases to federal court jurisdiction. The transfer of jurisdiction over some or all offenses committed by servicemen to civilian courts would, however, create substantial administrative difficulties. Already overcrowded dockets would become unmanageable and expenses would soar. Although a massive infusion of funds could solve many of these difficulties, it would be far more practical to reform the military courts substantially.

Another problem inherent in the grant of jurisdiction over civilian offenses to civilian courts is that servicemen may well be tried by juries less representative of his class than randomly selected court-martial juries. The average civilian does not understand the problems of the young enlisted man any more than a senior non-commissioned officer would.

Although it may become necessary at some point to transfer jurisdiction over offenses by servicemen to civilian courts, much can be done within the military system to increase the quality of justice by providing representative courts. Some ways by which Congress could bring the court-martial system into conformity with the jury guarantees of article III and the sixth amendment and the incorporated equal protection guarantees of the fifth amendment are discussed below.

In each of the methods to be discussed, it would be constitutionally permissible and, perhaps, desirable to place some limit on the eligibility of enlisted men and officers for service on courts. For example, the provision in the Bayh bill that court members have a minimum of one year's military service¹⁵⁴ appears reasonable. A year's exposure to the needs of the service should provide sufficient understanding of the military for intelligent service on a court martial, and, with the minimum enlistment age at seventeen, it would insure that court members are at least eighteen. Most drafted enlisted court members would be at least twenty and probably 21 since most men are drafted at age 19½.¹⁵⁵ In addition, regulations could be promulgated exempting a class or

154. S. 1127, 92d Cong., 1st Sess., § 825 (1971).

155. Although 19½ years is less than the current minimum age for civilian juries, eighteen year olds voters have been added to jury rolls in many areas due to extension of the vote and other rights to eighteen year olds. See "Teens May Soon Be Serving on Juries with Parent," *Herald-Telephone* (Bloomington, Indiana), Oct. 24, 1971, p. 1, col. 1. Under the "lottery" system, selective service registrants first receive a lottery number in the year in which they turned 19 and are not subject to draft until the following year. Regulations to the Military Selective Service Act of 1967, as amended, 32 CFR #1631.5(d). The median age for the armed services in 1969 was 22.7. Selected Manpower Statistics, Department of Defense, Directorate of Information Operations, 15 April 1970, p. 31. In 1969 the median age of Army enlistees was 22.7 years of age. Selected Manpower Statistics, Dep't of Defense (1970).

classes of personnel (such as military police or doctors in a war zone) whose members should not serve because of the likelihood of bias or because their duties are presumptively essential to the military mission.¹⁵⁶ The commander of the court-martial jurisdiction involved could be given a list of names chosen by one of the methods discussed below in advance of trial. He could then excuse those members who were engaged in duties so essential to the military mission that they could not be made available for trial. A list of those excused and the reasons for excusing them could be given to the military judge and made available for inspection by counsel for both sides. Finally, a liberal voir dire¹⁵⁷ policy coupled with an increase in the number of peremptory challenges¹⁵⁸ would enable both the government and the defense to eliminate officers and enlisted men thought to be lacking in the qualifications for service on a particular court-martial. So long as the number remaining on the court after challenges exceeded a statutory minimum, those remaining would constitute the court.¹⁵⁹

*Random Selection From a Pool Consisting of all Eligible
Officers and Enlisted Men in the Court-Martial Jurisdiction*

The method is essentially that proposed by Senator Bayh and Representative Bennett. The names of eligible officers and enlisted men would be placed in a common pool and names would be drawn at random. Those remaining after challenges would constitute the court. This method would most likely produce a court heavily weighted towards lower-ranked enlisted men who constitute the major population of any military jurisdiction. It is possible, moreover, that some courts chosen by this method would include no officers. Courts selected from a common pool would, however, certainly meet the strictest interpretation of requirements of article III, the sixth amendment and the due process clause of the fifth amendment.

*Random Selection from Separate Pools of
Eligible Officers and Enlisted Men With a
Predetermined Ratio of Officers to Enlisted Men*

156. HQ I Field Force Vietnam, Staff Memorandum 27-1, Feb. 21, 1971, excludes legal officers, officers in the Military Police Corps, chaplains, medical officers and nurses, inspectors general and some senior staff positions. *Id.* at ¶ 4(a).

157. An individual voir dire, permitted by most military judges, is essential and should be made a matter of right.

158. A minimum of three peremptories is desirable. UCMJ, art. 41(b), 10 U.S.C. § 841(b) (1970), provides for only one such challenge.

159. A minimum of ten to twelve members for a general court and four or five for a special court-martial would be desirable, although apparently not required constitutionally.

Under this system two separate pools would be created, one consisting of all eligible officers and the other of all eligible enlisted men. Either an enlisted/officer ratio for the initial panel or a minimum percentage (perhaps fifty per cent)¹⁶⁰ of enlisted personnel on the final court would be established. Senator Hatfield's bill calls for one-half enlisted men on the court, but his bill would retain the present requirement of article 25(d)(1) that when it can be avoided no member be junior in rank to the accused. There is some question whether this provision is constitutionally permissible in a system where right to trial by jury is recognized. Equal protection problems remain when officers can be tried exclusively by fellow officers, while enlisted men are tried by both officers and enlisted men. The community also has a stake in having juries representative of a broad cross section of its people. The interests of justice and society may not be served, for example, when a banker accused of defrauding small depositors is tried by a jury of bankers or persons in his general income bracket. Yet under the current system and even after substantial reforms like the Hatfield bill, a sergeant major charged with assaulting a private can be assured that no young enlisted men will sit in judgment of him.

The rationale behind forbidding subordinates from serving on the jury of a superior is that subordinates might have a bias against superiors which would influence their decision. But it seems no more likely that subordinates would unfairly judge superiors than that superiors, many of whom view disciplinary offenses as a direct challenge to their authority, would unfairly judge subordinates. Although Senator Hatfield's bill is far-reaching in comparison to the present system, it clearly maintains the decided and unfair advantage to officers and senior enlisted men of securing juries of their peers.¹⁶¹

Civilian courts do not permit the deliberate selection of a number of jurors from middle and upper income brackets equivalent to the

160. Providing only fifty per cent enlisted men would still fail to reflect their relative percentage weight in the armed forces. For the years 1968, 1969 and 1970, the combined enlisted strength was over 85 per cent of the total strength of all services combined. Dep't of Defense, Office of Ass't Sec'y for Econ. Opportunity, *Negro Participation in the Armed Forces by Grade* (mimeo. 1971).

161. The Hatfield bill also gives an accused officer or enlisted man the right to a court of which at least half the members are of the same rank or grade, if he so requests. It is questionable whether this provision would provide lower ranked enlisted men with more members in their grade than would be provided by the random selection method. Only senior N.C.O.'s and officers, who form a small part of the military community, would be favored by adding this provision to the excellent random selection portion of the bill. The Constitution requires only that persons of the defendant's rank not be systematically excluded, and there does not seem to be any legitimate advantage to military justice in providing any accused such a special jury.

fifty per cent representation of officers, but the practical result of most jury selection systems is the selection of predominantly middle class and middle-aged jurors. A percentage method may have somewhat the same effect since by permitting fifty per cent to be officers there is a greater likelihood of under-representation of peers of younger enlisted personnel and a lower representation of blacks on the courts. Many officers come from above average economic classes, and only a small percentage of officers is black.¹⁶² To justify such a result a court would have to rely on military necessity, but military necessity must be invoked with far more logical force that it has had in the past. Although there is an unfortunate tendency among military apologists to be satisfied with inequities because the civilian systems do no better, limiting officer membership to fifty per cent under a random selection would be a significant step forward.

Selection of Courts by a Jury Commissioner Under Appropriate Criteria Similar to Those Used by Many State Jury Commissions

A third possibility is the appointment of a military jury commissioner to select personnel who meet specific criteria, such as that approved in *Carter v. Jury Commissioner*.¹⁶³ Under this method, Congress would have to specify a cross-section of ranks to prevent the commissioner from leaning heavily towards senior personnel as under the present system. This selection process, however, would put some of the potential for abuse that the convening authority has under the present system in the hands of the jury commissioner. It would appear to have no legitimate advantages to the accused or to those concerned with discipline and would probably be more expensive and difficult to administer than a random system. The difficulty of establishing proper criteria and of enforcing the use of those criteria by the commissioners would also lead to otherwise unnecessary litigation. Although a commissioner system would probably withstand constitutional attack, it would seem far less desirable than a random selection system.

162. In 1968, only 3.3 per cent of Army officers were black. In 1969, the percentage was 3.2, and in 1970 this increased to 3.4 per cent. For the combined branches of the armed forces, the relevant percentages were 2.1 per cent in 1968; 2.1 per cent in 1969 and 2.2 per cent in 1970. Dep't of Defense, Office of Ass't Sec'y for Econ. Opportunity, *Negro Participation in the Armed Forces by Grade* (mimeo. 1971). At the same time, 12.6 per cent of enlisted men in the Army were black in 1968; 10.7 per cent in 1969 and 13.5 per cent in 1970. *Id.* Women would also be underrepresented although primarily because they represent such a small group in the military community. As of December 31, 1969, there were only 39,506 women in all the services combined. *ABSTRACT*, *supra* note 72, table 388, at 258.

163. 396 U.S. 320 (1970).

*A Dual System, Employing Courts Fully Meeting Constitutional
Standards for the Trial of Civilian and Serious Military Crimes
and Courts Held to Lesser Standards for the Trial of
Military Offenses*

The distinction between military and civilian offenses in military law permits a great deal of flexibility in applying the guarantees of jury trial to accused servicemen. Since the interest of the military is greatest where military offenses are involved, a dual system would permit the military some disciplinary control over such offenses, while insuring the accused greater rights to trial by jury for civilian offenses. The branch of a dual system which would try civilian offenses and military offenses in which a punitive discharge or a sentence of more than six months is sought would comply with the jury-selection requirements of federal courts. The single-pool randomly selected jury, such as that discussed above, would clearly meet those standards.

The disciplinary branch of the dual system would be special courts-martial for the trial of military offenses only without the power to adjudge either a punitive discharge or confinement in excess of six months. Members would be chosen as they are today or with a set ratio of officers to enlisted men. Alternatively a randomly selected judge could sit alone at the option of the accused. Conviction in a disciplinary court, while remaining part of a serviceman's record, would not be considered criminal in nature and would be treated as nonjudicial punishment. Since the jury provisions of the Constitution do not now apply to courts which are not empowered to adjudge sentences in excess of six months, trial by judge alone would be constitutional.

Since most military crimes are currently tried before a special court-martial, the major change under a dual system relying on special courts for trial of military offenses would be the disciplinary court's nonjudicial characterization and its inability to adjudge a bad conduct discharge. One solution to the loss of power in disciplinary special courts-martial to separate convicted servicemen would be to permit courts to award honorable or general administrative discharges. These courts would be required to conform to the rules of evidence and procedure of judicial courts. If a prosecutor believed a punitive discharge or more than six months' confinement were warranted, he could refer the case to trial before a general court-martial with a constitutional jury. Trial by special court-martial with a constitutional jury would also be available for

civilian crimes.¹⁶⁴ Those crimes which are both civilian and military in nature, such as an assault upon an officer, could be tried in either type of court.¹⁶⁵

There seems to be no legitimate justification for the current practice of adjudging federal felony convictions without the benefit of a constitutional jury. Since the disciplinary courts would be nonjudicial in nature, no criminal record would be maintained. If a prosecutor felt an offense were serious enough to merit a criminal record, he could refer the case to a constitutional jury.

There are, however, significant disadvantages to a dual system of military courts. Chief among these disadvantages is the likelihood that commanders will take advantage of, reduced critical scrutiny over disciplinary courts and pack them with conviction-minded members. Unless a random selection were required, court packing would probably be far more of a problem than it is today. It should be remembered that military offenses outnumbered civilian offenses. In turn, a great deal of bitterness about military justice comes from those who feel "railroaded" for committing a disciplinary offense. Although the inability of a disciplinary court to adjudge punitive discharges or confinement in excess of six months would tend to ameliorate these feelings, it would have the salutary effect on morale that representative enlisted participation on those courts would bring. As a practical matter a court composed of one half randomly selected enlisted men would be highly desirable in the disciplinary courts.

CONCLUSION AND RECOMMENDATIONS

O'Callahan marks the first recognition by the Supreme Court that servicemen may be entitled to the protections of article III and the fifth and sixth amendments in relation to trial by jury. As in previous decisions, however, the Court gave scant attention to the practical problems involved in attempting to resolve the tension between the war powers of Congress and the President on the one hand and the judicial

164. The same appellate system could be used for all courts. Some provision would have to be enacted by which higher courts could interpret law for the disciplinary courts. The accused would be afforded the same procedural rights and right to counsel as he now receives.

165. The Bennett bill would set up specific areas of jurisdiction for "upper" and "lower" courts similar to the present general and special courts-martial. The decision as to which court tries a case is not in the commander's hands. Jurisdiction over civilian crimes would only be allowed outside the United States. The Hatfield bill would limit the military to jurisdiction over eighteen military offenses, transferring all other crimes to federal jurisdiction. Both bills would require random selection within the military courts. See *Proposals*, *supra* note 133, at 28-33.

requirements of article III and the fifth and sixth amendments on the other. The Constitution contains neither a clear grant of jury trial to members of the armed services nor a clear denial. The history of article III and the sixth amendment and the history of military practice in the late eighteenth century is not particularly helpful. Although most civilian crimes were tried by civilian courts, a number of defendants were apparently brought before military tribunals without a jury of peers. To resolve the question of military juries one must ultimately look to the fundamental importance of the right of trial by jury and to the changing disciplinary needs of the military.

In light of both the vast social changes taking place in the civilian and military sectors of American society and the changes which have had and will continue to have profound effect upon military discipline, suggestions that reform in court selection will lead to the downfall of military discipline are no longer persuasive. No convincing evidence has been presented that military discipline will collapse or even suffer noticeably if juries are chosen in a fair and representative manner.

There is a wide range of options available to Congress to fashion a constitutionally acceptable system of jury selection along the lines indicated above. The simplest way of assuring servicemen their right to trial by jury would be to provide for random selection without regard to rank of all jurors for the trial of civilian and military offenses in the military courts. The dual system of special courts-martial, however, may well stand as the best means of assuring the serviceman his constitutional right to trial by jury, while satisfying the demands of the military for significant officer representation. Although nonrepresentative juries in nonjudicial disciplinary courts with limited sentencing power could conceivably be upheld under the doctrine of military necessity, fairness dictates that the disciplinary courts be composed of at least one-half randomly selected enlisted men. A desirable system would include fully representative juries in both general courts-martial and civilian offense special courts-martial, while juries including one-half randomly selected enlisted men would sit on disciplinary courts. The advantages such a dual military system offers the accused are obvious. For a serious crime he has the right to trial by a jury of his peers. For minor military offenses he has at least a number of his peers as jurors.

The advantages to the military are also significant. The major advantage is simply one of military prestige. Recognition of a serviceman's right to trial by a jury of peers would be a great credit to the

armed forces when, as now, they are seeking to improve their image and to attract volunteers. Further, a dual system could lead to a solution of many of the problems created by *O'Callahan*. A constitutionally proper military jury would be an important step towards improving the military justice system and might render extension of civilian court jurisdiction over military offenses unnecessary. *O'Callahan* does not require civilian courts to take jurisdiction over military offenders; it merely denies military jurisdiction because of the substantial defects in military justice.

If representative juries did cause some loss of discipline, it would be a small price to pay for applying the critical right of trial by jury to the three million American citizens entrusted with protecting all of the rights and duties created by the Constitution. Rather than reducing discipline, however, randomly-selected and representative juries might well play a significant role in increasing the integrity and effectiveness of the American armed services.